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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JANET S. JACOBSEN et al., **Plaintiffs and Appellants,** **v.** **CAROL ANN ERICKSON,** **Defendant and Respondent.**	**A122068, A122712** **(Contra Costa County Super. Ct. No. C0302991)**

This is a dispute between three homeowners who live in El Cerrito and who share a common driveway. Two of those homeowners appeal contending the trial court erred when it (1) ruled they were only entitled to access a portion of the driveway, and (2) refused to enforce a parking restriction. We conclude the trial court interpreted the governing deeds incorrectly and remand for the appropriate modifications.

I. FACTUAL AND PROCEDRUAL BACKGROUND

Appellants Janet S. Jacobsen and Claudine Swickard, and respondent Carol Ann Erickson own homes that are adjacent to each other on Arlington Boulevard near Terrace Drive in El Cerrito. Prior to 1977, all three homes were located on a single lot and were owned by Sundar Shadi and his wife Dorothy. Hoping to subdivide the property, the Shadis hired Robert Wilson, a land surveyor. Wilson prepared a tentative parcel map and submitted it to the planning department for the City of El Cerrito. The tentative map proposed to divide the property into three parcels, designated A, B, and C, and proposed

that a 16-foot easement for access and utilities be placed on the northern portion of the property.

The City of El Cerrito evaluated Wilson's tentative map and approved the subdivision subject to several conditions. Two of them are relevant here. The first stated that "a sixteen-foot driveway easement which includes the portion of the turnaround area on Parcel B shall be included as part of the Parcel A with easements granted to Parcel B and C." The second stated that "a Maintenance Agreement shall be executed and recorded covering maintenance responsibility and restricted parking for all shared driveway areas."

Wilson prepared, and on January 14, 1977, the Shadis recorded a final parcel map that incorporated the city's requirements. It shows the property being divided into three lots designated Parcels A, B, and C. Parcel A is configured as a flag lot with what is described as a "proposed 16' access & utility easement" located on the "pole" portion of "flag." Parcels B and C are located adjacent to the easement that is on the "pole" section of Parcel A.

Shortly after the final parcel map was recorded, the Shadis conveyed Parcel B to Richard Holmes. Apparently, to comply with the conditions that had been imposed by the City of El Cerrito, the vesting deed granted Holmes an appurtenant easement over the "pole" section of Parcel A. Specifically, the deed granted Holmes "A right of way (not to be exclusive) for use as a roadway for vehicles of all kinds, pedestrians and animals, for water, gas, oil and sewer pipe lines, and for telephone, television service, electric light and power lines, together with the necessary poles or conduits, as an appurtenant to Parcel [B] above over that portion of Parcel A designated as "'Proposed 16' Access & Utility Easement" on Parcel Map filed January 14, 1977, Book 51, Parcel Maps, page 32, Contra Costa County Records."

Also apparently to comply with the conditions that had been imposed by the City of El Cerrito, the deed from the Shadis to Holmes included the following maintenance

and parking restrictions: "By acceptance of this deed, the Grantee herein, his successors and assigns agree to maintain the easement described herein . . . . It is also agreed by all parties herein that said easement is to be used for ingress and egress purposes only for pedestrians and vehicles with no parking or obstructions thereon."

Subsequently Holmes conveyed Parcel B to Wolfram Eberhard who conveyed it to appellant Janet Jacobsen (then known as Janet Remer) and her ex-husband in July 1978. The deeds from Holmes to Eberhard and from Eberhard to Jacobsen included the same language that is set forth above granting an appurtenant easement over Parcel A. But significantly for purposes of the present dispute, those deeds did not include the parking restriction language that was contained in the deed from the Shadis to Holmes.

In April 1977, the Shadis conveyed Parcel C to Theodore and Teruko Miller who conveyed it to appellant Claudine Swickard in 1988. The deeds from the Shadis to the Millers and from the Millers to Swickard included the same language that is set forth above granting an appurtenant easement over Parcel A. Again, those deeds did not include language that described a parking restriction.

In May 1977, the Shadis conveyed Parcel A to Robert Pollak. Pollak then conveyed Parcel A to respondent Carol Ann Erickson in February 1987.

It appears the various owners of Parcels A, B, and C shared the common driveway with little dispute until the late 1980s. However, after Erickson purchased her house, she converted her garage into a living space. Thereafter, Erickson and her tenants began to park their cars on the "pole" portion of the common driveway. This caused problems for Jacobsen who owned Parcel B because it sometimes made it difficult for her to back out of the parking area that was in front of her house. It also caused problems for Jacobsen because her bedroom is less than 20 feet from the common driveway, and when cars park there, it is noisy and unsightly.

Despite these problems, the parties muddled on until November 2003 when Jacobsen and Swickard filed the complaint that is at issue in the current appeal. As is

relevant here, it named Erickson as a defendant and set forth two causes of action. The first alleged Jacobsen and Swickard each owned an easement over Erickson's property and sought a declaration of their respective rights and interests. The second sought an injunction to prevent Erickson from parking on the easement or from otherwise interfering with Jacobsen's and Swickard's use of the easement.[1]

The case was tried to a court in June 2006. At that point, two primary issues were still in dispute. The first concerned the precise scope of the easement. The map that depicts the easement shows a driveway of generally uniform width that becomes wider and forms what the parties characterized as a turnaround area when it reaches the main or "flag" portion of Parcel A. The parties disagreed whether the easement included the turnaround area. The second primary issue was whether the parking restriction that was contained in the deed from the Shadis to Richard Holmes was enforceable.

The trial court ruled in favor of Erickson on both points. It ruled the easement did not include the turnaround area, and that even if it did, Jacobsen and Swickard had abandoned their right to use the turnaround area. The court also ruled the parking restriction that was contained in the deed from the Shadis to Holmes was not enforceable because it did not qualify as a covenant or an equitable servitude.

After the trial court issued a judgment and statement of decision setting forth these rulings, Jacobsen and Swickard filed this appeal.[2]

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[1] Erickson filed a cross-complaint; however, the parties settled that dispute and the issues set forth therein are no longer relevant.

[2] Jacobsen and Swickard are represented by separate counsel, however, the briefs they have filed raise similar issues. We will address their arguments jointly unless more specificity is needed.

II. DISCUSSION

A. Whether the Easement includes the Turnaround Area

The trial court ruled that the easements granted to Jacobsen and Erickson excluded the turnaround area. In its statement of decision, the court explained its ruling on this point as follows: "The Flare area or 'turnaround' was not included in the Roadway Easement. The 1977 Parcel Map clearly and unambiguously shows, on its face, that the Flare area or 'turnaround' is not part of the area depicted on the 1977 Parcel Map as 'Proposed 16' Access & Utility Easement.' The Court did not reach the issue [of] whether Robert Wilson and others responsible for the preparation and submission of the 1977 Parcel Map intended to include the Flare area or 'turnaround' as part of the area depicted on the 1977 Parcel Map as 'Proposed 16' Access & Utility Easement' because their intent was irrelevant. The final Parcel Map (Exhibit 5) does not refer to the Flare area or 'turnaround.' The deeds to the Plaintiffs for Parcels B and C, respectively, do not refer to the Flare area or 'turnaround' in the description of the Roadway Easement granted to them."

Appellants now contend the trial court erred when it ruled their easements did not include the turnaround area.

"In construing an instrument conveying an easement, the rules applicable to the construction of deeds generally apply. If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired." (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.) The interpretation of an easement, which does not depend upon conflicting extrinsic evidence, is a question of law. (*McCann v. City of Los Angeles* (1978) 79 Cal.App.3d 112, 115, fn. 2.)

Here, the trial court interpreted the deeds granting the easements without the use of extrinsic evidence. Therefore, the interpretation of those documents is an issue of law

that we must review de novo on appeal. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

The deeds to Jacobsen and Swickard, and all the deeds in their respective chains of title grant an appurtenant easement over Parcel A. The specific language grants a "right of way (not to be exclusive) for use as a roadway for vehicles of all kinds . . . over that portion of Parcel A designated as "'Proposed 16' Access & Utility Easement" on Parcel Map filed January 14, 1977, Book 51, Parcel Maps, page 32, Contra Costa County Records."

Where a deed describes the property interest being conveyed by referring to a map, the map becomes part of the deed and is deemed to have the same force and effect as if it had been copied directly into the deed. (*Calvi v. Bittner* (1961) 198 Cal.App.2d 312, 316.)

The map described in deeds is the Parcel Map that was prepared by Wilson and that was recorded when the Shadis subdivided their property in 1977. The easement is depicted on that map as a single, separately-label portion of Parcel A that begins at Terrace Drive, continues past Parcels C and B, and then begins to flare and become wider as it approaches the main portion of Parcel A. There are no lines that separate the turnaround area from the remainder of the easement that indisputably was granted to the owners of Parcels B and C. The turnaround area is neither separately labeled nor fully enclosed. On this record, we do not hesitate to conclude that the turnaround area was part of the easements that were conveyed.

Our conclusion on this point is supported by case law. In *Main v. Legnitto* (1964) 230 Cal.App.2d 667, a recorded subdivision map depicted a road that ran though a subdivision to a crescent shaped cul-de-sac, and the issue on appeal was whether the cul-de-sac was part of the road. Justice Sullivan, then sitting on the Court of Appeal, ruled that it was, explaining his decision as follows: "Such area appears on the map as a cul-de-sac at the northeasterly end of the road. There is no line or other divisional notation

separating it from the rest of the strip marked 'Marin Road.' As a cul-de-sac it is an integral part of the road. Indeed the word 'ROAD' which follows 'MARIN' extends into the crescent. The crescent is not numbered or otherwise designated as a separate parcel of land while all blocks appearing on the map are fully enclosed and separately numbered and all lots . . . are also fully enclosed by appropriate lines and separately numbered." (*Id.* at p. 675.)

The conclusion we reach is supported by an important rule of interpretation. Deeds are interpreted like contracts, (*City of Manhattan Beach v. Superior Court*, *supra*, 13 Cal.4th at p. 238) and one of the cardinal rules of contract interpretation is that a written instrument must be interpreted to give effect to every part. (See Civ. Code, § 1641.) The map that depicts the easement sets forth the length of the easement's sides. Specifically, the map shows the easement starts at Terrace Drive, proceeds west 159.48 feet, turns south 32.08 feet, turns east 15.00 feet, turns northeast for 19.50 feet, and then returns east to Terrace Drive. If the easement is interpreted to include the turnaround area, all of these measurements are given effect. By contrast, if the map is interpreted to exclude the turnaround area, the 159.48, 32.08 and 15.00 foot measurements would be meaningless. An interpretation that renders part of a deed as meaningless should be avoided. (*Van Slyke v. Arrowhead etc. Power Co.* (1909) 155 Cal. 675, 680; *Burnett v. Piercy* (1906) 149 Cal. 178, 189.)

None of the arguments Erickson makes convince us a contrary conclusion is appropriate. First, Erickson argues easement should not be interpreted to include the turnaround area because that term is not used in the final parcel map. While the final map does not describe the wider portion of the easement as a turnaround area, that is of no moment. The map describes the easement as an "access & utility easement" and one common use of an access easement would be to use it as a turnaround area.

Next, Erickson argues the easement should not be interpreted to include the turnaround area because the deeds to Jacobsen and Swickard did not use that term when

describing the easement that was granted. While the deeds to Jacobsen and Swickard did not refer specifically to a turnaround area, those deeds did refer to a recorded map, and as we have explained, the recorded map unequivocally includes the turnaround area.

Finally, Erickson argues the easement should not be interpreted to include the turnaround area because the turnaround area is 32 feet wide, not 16 feet wide as described on the parcel map that depicts the deed. However, the phrase "'proposed 16' access & utility easement" was simply used to identify the portion of the parcel map in question that was being conveyed as an easement. It did not purport to describe the parameters of the entire easement. While the map itself shows a portion of the easement may indeed be 16 feet wide, the map unequivocally demonstrates that the remainder is wider and that both areas are included within the scope of the easement.

We conclude the easements granted to Jacobsen and Swickard included the turnaround area.

B. Abandonment

The trial court ruled that even if the easements granted to Jacobsen and Swickard included the turnaround area, both had abandoned their rights to use the turnaround area through nonuse.

Jacobsen and Swickard now challenge that ruling arguing the court's ruling was unsupported.

An easement that is obtained by prescription may be extinguished through mere nonuse. (*Jordan v. Worthen* (1977) 68 Cal.App.3d 310, 322.) However, an easement that is established by grant may only be extinguished through nonuse and an intent to abandon. (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1384.) "Abandonment hinges upon the intent of the owner to forego all future conforming uses of the property, and there must be conduct demonstrating that intent which is so decisive and conclusive as to indicate a clear intent to abandon. [Citation.]" (*Id.* at p. 1385.)

Here, the trial court never ruled that Jacobsen or Swickard *intended* to abandon their right to use the turnaround area, and as to Jacobsen, the court ruled specifically there was no evidence that she intended to partially abandon her easement. As the court explained: "Other than her failure to use the Flare area or 'turnaround,' there were no decisive and unequivocal acts on the part of Jacobsen that evidenced an intent to abandon any rights she may have had to use the Flare area or 'turnaround' for ingress and egress to and from Parcel B. Other than her failure to exercise or assert such rights, there were no decisive or unequivocal acts on the part of Jacobsen that that evidenced an intent to abandon any rights she may have had to have the Flare area or 'turnaround' used solely for ingress and egress purposes and kept free of parked vehicles and other obstructions . . . ."

As for Swickard, she testified that when she purchased the property, she did not understand the full extent of the easement or how big it was. As another court explained in similar circumstances, "If it is the case that the [easement owners] were in fact unaware of their right to a private easement, they could hardly be held to have ever *intended* to abandon such a right." (*Tract Development Services, Inc. v. Kepler, supra,* 199 Cal.App.3d at p. 1385.)

Absent evidence of an intent to abandon, the court's ruling that Jacobsen and Swickard partially abandoned their easements cannot stand.

Erickson *does not* argue there was substantial evidence of an intent to abandon. Rather she asserts two legal arguments in an effort to salvage the trial court's ruling on this point. First, Erickson contends there has been a "partial loss" of the driveway easements granted to Jacobsen and Swickard "by prescription or adverse possession." We reject this argument on procedural grounds. The answer Erickson filed did not allege Jacobsen or Swickard partially lost their easements through prescription or adverse possession, and "[a]s a general rule an issue not presented by the pleadings cannot be considered upon appeal." (*Munfrey v. Cleary* (1946) 75 Cal.App.2d 779, 784; see also

Willis v. Bank of America (1973) 33 Cal.App.3d 745, 751.) The rules on appeal provide one exception to that general rule: "[A]n appealed judgment or order will be affirmed if it is correct on any theory, regardless of the trial court's reasons in support [citation]. Thus, respondent can assert a new theory on appeal in order to establish that the judgment was correct on that theory . . . ." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 8:241, p. 8-160.) However that appellate rule is itself subject to an important exception. A respondent cannot assert a new theory on appeal if doing so would unfairly prejudice an appellant by depriving her of the opportunity to litigate an issue of fact. (*Ibid.;* see also *Bailon v. Appellate Division* (2002) 98 Cal.App.4th 1331, 1339.)

Here, the answer Erickson filed never put into issue whether Jacobsen or Swickard may have partially lost their driveway easements through prescription or adverse possession. Because those issues were not pleaded, Jacobsen and Swickard did not have the opportunity to present whatever evidence they may have had on the factual issue of whether the elements of those legal doctrines were satisfied. We decline to affirm the trial court's ruling on grounds that were not pleaded and that would deprive appellants of the opportunity to present evidence on disputed factual issues. (Cf. 14859 *Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1403, fn. 1.)

Alternately, Erickson argues Jacobsen's and Swickard's use of the turnaround area was extinguished as the result of Erickson's incompatible act of parking her vehicles there for many years. Again, Erickson cannot validly assert this argument because she did not raise it in her answer, and affirming on that ground we would deprive appellants the opportunity to present whatever evidence they may have had. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra,* ¶ 8:241, p. 8-160.) We also reject the argument on its merits.

The extinguishment of an easement through an incompatible act is an extreme and powerful remedy which is utilized only when use of the easement has been rendered

impossible. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 767.) The interference must be material and permanent rather than occasional and temporary in order to justify extinguishment. (*People v. Ocean Shore Railroad* (1948) 32 Cal.2d 406, 418.)

The record here does not contain any evidence of a physical change which created a permanent and material interference which was incompatible with use of the easement. At most, Erickson and her tenants regularly parked their cars on the turnaround area. That type of intermittent use is not a *permanent* material interference that could justify extinguishment.

We conclude the trial court erred when it ruled that Jacobsen and Swickard had abandoned their easements.

C. Parking Restriction

As we have stated, the deed pursuant to which the Shadis granted Parcel B to Richard Holmes granted Holmes "[a] right of way (not to be exclusive) for use as a roadway" over a portion of Parcel A. The deed then went on to state, "It is also agreed by all parties herein that said easement is to be used for ingress and egress purposes only for pedestrians and vehicles with no parking or obstructions thereon."

The trial court ruled the parking restriction set forth in the Shadi/Holmes deed granted Holmes the right to have the easement used "for ingress and egress purposes only for pedestrians and vehicles with no parking or obstructions thereon . . . ." However, the court ruled the parking restriction was not binding on Erickson because it did not qualify as either a covenant that ran with the land under Civil Code section 1468 or an equitable servitude.

Appellants now challenge that ruling arguing the trial court erred when it ruled Erickson was not subject to the parking restriction.

The clear and explicit language of the deed from the Shadis to Holmes granted Holmes an appurtenant easement over Parcel A. No one disputes that fact. However, the easement granted was subject to certain rights and restrictions. Specifically, that parties

agreed that "said easement is to be used for ingress and egress purposes only for pedestrians and vehicles with no parking or obstructions thereon." This language is not ambiguous. The easement could only be used to enter and exit and could not be used for parking.

The reason for the parking restriction is apparent from the nature of the roadway that is located on the easement. That roadway is quite narrow and the adjacent homes are located very close to the driving surface. If cars are allowed to park on the driveway, not only would others be impeded from using it, all three homeowners would be forced to gaze at cars parked only feet from their front door. It was entirely reasonable for the parties to restrict parking on the easement.

The trial court ruled the parking restriction was not enforceable because it did not qualify as a covenant that ran with the land or as an equitable servitude. That may or may not be true, but the point is irrelevant because the parking restriction was an aspect of the deeded *easement* that was granted to Holmes.

An easement is a nonpossessory interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using her land. (*Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 880.) It differs from a covenant running with the land and from an equitable servitude in that the latter are created by promises concerning the land, while an easement is an interest in land. (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 382, p. 447.) Two cases help illustrate this distinction.

In *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 Cal.App.2d 698 (*Minnette*), two deeds granted PG&E easements for the maintenance of power lines. The deeds contained separate covenants under which the grantors agreed they would not erect or maintain any building or structure on the property. (*Id.* at p. 701.) When PG&E sued successors of the grantors to compel the removal of an encroaching structure, the successors attempted to argue the agreements not to erect or maintain a building or

structure on the property were merely personal covenants that did not run with the land. (*Id.* at p. 707.) The *Minnette* court rejected that argument stating that "appellants misconceive the nature of the so-called covenants. Strictly speaking, they are not covenants at all, but are statements of the servitudes placed upon the grantor's land as part and parcel of the easements created by the grants. True, they are stated in the form of covenants, but when the grants are considered as a whole it is clear that these covenants are descriptive of the servitudes created and are not mere covenants. The right to have the land contained within the boundaries of the rights of way remain free of buildings was germane to the main purpose of the right to erect and maintain the transmission lines." (*Id.* at pp. 707-708.)

By contrast in *Marin County Hospital Dist. v. Cicurel* (1957) 154 Cal.App.2d 294 (*Cicurel*), the deed in question granted a parcel of land "together with a right of way for all purposes of travel or as a roadway over and along a strip of land having a uniform width of ten feet and lying immediately north" of the parcel conveyed. (*Id.* at p. 296.) The deed then went on to state that the grantors agreed "to extend one of the roads of the tract to connect with said strip as to give ingress and egress thereto to vehicles if so requested" by the grantee. (*Ibid.*) On appeal, the *Cicurel* court was required to determine the precise legal nature of the agreement to extend the road. The court resolved that issue as follows: "the real problem is . . . whether an easement . . . was in fact created. It will be noted that the grantor did not define the location or width of the roadway. While this would not be fatal to the creation of an easement, it is entitled to some weight. It is also to be noted that when the deed was executed the road involved was not in existence. Of even greater importance is the fact that under the terms of the clause the grantor was required to take some action, perform some act on his own property—i.e., upon request to construct the roadway and to connect it with the right-of-way. But the grantor was not required to act until he had been requested to do so by the grantee. These provisions are totally inconsistent with creating an interest in the land of another. Such provisions must

be construed as disclosing an intent on the part of the parties to create a covenant and not an easement." (*Id.* at p. 299.)

The case is much closer to *Minnette* than to *Cicurel.* As in *Minnette,* the parking restriction described the easement that was being granted. The right to have the property kept free from parked vehicles was part and parcel of that easement and was essential to the easement's apparent purposes: to keep the driveway free of obstructions so all could use it, and to avoid the visual blight and unpleasant consequences that would follow from having vehicles parked so close to one's house. By contrast, the present case is nothing like *Cicurel* because the pivotal language granted a right that was not contingent upon any future act.

We conclude the parking restriction was part and parcel of the easement that was granted. It was not a mere covenant or an equitable servitude.

Characterizing the parking restriction as part of the easement that was granted to Holmes has important consequences for this case. While the subsequent deeds granting Parcel B from Holmes to Eberhard and from Eberhard to Jacobsen included the easement but not the parking restriction language, the law is settled that an appurtenant easement passes automatically when property is transferred even though it is not mentioned in a deed. (*Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568.) Respondent does not dispute that fact. Therefore, the parking restriction specified in the Shadi/Holmes deed passed to Eberhard and then to appellant Jacobsen even though that restriction was not specifically set forth in their deeds.

We conclude the parking restriction was valid and enforceable against Erickson because it was an easement.[3]

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[3] Having reached this conclusion, we need not address the arguments Erickson makes concerning why the parking restriction might not be enforceable as a covenant or equitable servitude.

D. Injunction

The evidence at trial showed Erickson commonly accessed her home from the street by backing down the common driveway to the parking area in front of her house. However, Erickson's hearing was impaired and she had physical limitations that made it difficult for her to turn her head around. Given that Swickard had young children who sometimes played in the driveway, the method Erickson used to access her house arguably was dangerous.

Based on this evidence the trial court issued a statement of intended decision that Erickson should be enjoined from backing into or out of the driveway.

On July 18, 2007, more than a year after the trial was concluded, the trial court conducted a hearing on objections that had been filed to a proposed judgment. During the course of that hearing, Leslie Levy, who represented Jacobsen, Swickard, and Swickard's husband Nigel Arscott, made the following statement: "And as I recall, and I will stipulate, my clients, all three of them have said that they would be happy to be enjoined from backing in or out of the easement themselves. So if you want to make it mutual, they'll do that."

Later in the hearing, Levy was more equivocal about the scope of her authority: "it's been a long time since I had this discussion with my clients. I believe that this was their — they stipulated, but I would have to confirm with them."

Jacobsen, Swickard, and Arscott were *not* present at the July 18, 2007 hearing. Nonetheless, on August 2, 2007, the trial court filed an order stating that "[t]he 'backing up' restrictions shall apply to plaintiffs as well, pursuant to stipulation by Attorney Levy."

On August 13, 2007, Levy informed the court that her clients were not willing to stipulate to make the injunction mutual. The court declined to set aside the order making the injunction mutual.

Subsequently, Cary Dictor, cocounsel for Swickard, filed a motion to set aside the mutual aspects of the injunction arguing that Levy lacked the authority to bind his clients and the court had failed to obtain or confirm the clients' agreement to be bound. Levy filed a notice of joinder in the motion on behalf of Jacobsen and Arscott.

On June 10, 2008, the trial court granted the motion to vacate with respect to Swickard and Arscott, but denied it as to Jacobsen. The court ruled Levy's motion was untimely and granted her leave to file a motion to modify the judgment.

On June 13, 2008, Levy filed a new motion to vacate, raising the same arguments that had proven successful for her coplaintiffs earlier. The court denied the motion ruling there was "no legal basis stated for the relief sought."

Jacobsen now appeals contending that Levy lacked the authority to stipulate that an injunction be entered against her.

An attorney has the authority to bind her client with respect to procedural matters but has no authority to impair her client's substantial rights. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583.) The law is well settled that an attorney must be specifically authorized to settle and compromise a claim and that merely on the basis of her employment she has no implied or ostensible authority to bind her client to a compromise or settlement of pending litigation. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 407.) An agreement by an attorney that is beyond the scope of her authority is not enforceable. (*Levy v. Superior Court, supra,* 10 Cal.4th at p. 586.)

Here, Jacobsen was not present when Levy stated Jacobsen was willing to stipulate that an injunction be entered against her, and the evidence that was subsequently submitted to the court unequivocally demonstrated that Levy did not possess the authority to enter into such a stipulation. Under these circumstances, the purported stipulation was not enforceable. The trial court erred when it failed to set aside that portion of the judgment. Indeed, respondent has presented no argument to the contrary.

III. DISPOSITION

The matter is remanded to the trial court so it can prepare a modified judgment that is consistent with the views expressed in this opinion. Costs to appellants.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.